

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

993

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
District of Columbia Circuit

FILED JUL 9 1970

Nathan J. Paulson
CLERK

UNITED STATES OF AMERICA

Appellee

v.

ROMIE DAVID BRINKLEY

Appellant

Criminal # 477-69
(No. 24012-)

BRIEF OF APPELLANT

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628-6350

Appointed By This Court

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STATUTES INVOLVED

Title 22, D. C. Code, Section 2204

"Any person who, without the consent of the owner shall take, use, operate, or remove, or cause to be taken, used, operated, or removed from a garage, stable, or other building, or from any place or locality on a public or private highway, park, parkway, street, lot, field, inclosure, or space, an automobile or motor vehicle, and operate or drive or cause the same to be operated or driven for his own profit, use, or purpose shall be punished by a fine not exceeding One Thousand Dollars or imprisonment not exceeding five years, or both such fine and imprisonment."

United States Constitution

FIFTH AMENDMENT

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces or in the Militia when in actual service in time of war or public dangers; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation."

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA

Appellee

v.

ROMIE DAVID BRINKLEY

Appellant

Case No. 477-69
(Cr. 24012-70)

BRIEF OF APPELLANT

Romie David Brinkley, appellant herein, by his Court appointed attorney, herewith respectfully submits his Brief in the above-captioned appeal.

STATEMENT OF QUESTIONS INVOLVED

Whether appellant's right to due process of law as guaranteed by the Fifth Amendment to the United States Constitution was abridged because of the delay of one year between the alleged offense and appellant's first knowledge of the charge for which he stands convicted.

This case has not previously been before this Court under the same or similar title.

Reference to rulings - none

STATEMENT OF THE CASE

On April 2, 1969, the Grand Jury returned a two count indictment against Romie David Brinkley, appellant herein (R1) charging him with unauthorized use of a motor vehicle and interstate transportation of a stolen motor vehicle; on April 13, 1969, appellant entered a plea of not guilty (R2). On April 21, 1969, counsel was appointed to represent appellant (R5). On May 23, 1969, a Motion To Dismiss The Indictment was filed. The motion was argued on July 29, 1969 (tr. m. 1-33) and was by Order denied on October 1, 1969 (R11).

On October 29, 1969, appellant was, after waiver of trial by jury (R13) tried by the Court (tr. 1-24 and 1-46, afternoon session) and was found not guilty of Count One, interstate transportation of a stolen motor vehicle and guilty of Count Two, unauthorized use of a motor vehicle.

At the hearing on the Motion To Dismiss, Officer Terrance M. Sheehan, Metropolitan Police Department, testified that on February 25, 1968 at approximately 6:40 A. M., he observed appellant operating a 1954 Chevrolet automobile with Tennessee tags; appellant was going in a slow fashion weaving in and out of lanes. Officer Sheehan pulled him over and requested appellant's driver's permit and registration; appellant had neither; he stated that the car belonged to a friend. Officer Sheehan placed appellant under arrest.

Officer Sheehan made a "stolen check" on the car and took appellant to the precinct; when informed in the negative concerning the "stolen check," Officer Sheehan charged appellant with driving without a permit. Officer Sheehan ascertained appellant's full name and address and thereafter appellant elected to forfeit collateral in the amount of Fifty Dollars (tr. m. 3). Officer Sheehan further testified that within twenty-four hours after the arrest for the traffic violation, he discovered via the police teletype sheet that the car operated by appellant had been reported stolen; the following morning, February 26, 1963, he testified he applied for a warrant for appellant's arrest (tr. m. 9). Shortly thereafter, on March 7, 1963, Officer Sheehan testified that he secured a supervening warrant charging appellant with "bringing stolen property into the District," (tr. m. 10). It was Officer Sheehan's belief that this warrant was at that point in time forwarded to the Thirteenth Precinct, inasmuch as appellant lived in that area (tr. m. 23).

Officer Sheehan variously testified that he personally attempted to serve the warrant eight to ten times (tr. m. 11-12, 21); eight to fifteen times (tr. m. 21); five or six times (T. tr., Vol. II 24); four or five times (T. tr., afternoon 5). He testified that he talked to appellant's mother and father (tr. m. 12-14, T. Vol. II 11-12); he talked to neighbors (tr. m. 13). None of his attempts to serve the warrant were successful. Officer Sheehan testified that he tried to serve the warrant for "a couple of months" (tr. m. 10); he kept no records of his attempts to serve the warrant (tr. m. 24), and thought he made his last attempt to serve it in April and May, 1963, but he was unsure when he made his final attempt to serve the

warrant (tr. m. 24). Appellant was ultimately arrested on February 22, 1969, three days short of a year after the date of alleged offense.

The appellant, Mr. Brinkley, testified (tr. m. 46-53) that on the evening of February 24, 1963, he went to a beer garden at approximately 10:00 P. M. and met a friend who asked if appellant would like to go to a party with him. Mr. Brinkley and his friend caught a cab and proceeded to the party at an address on 48th Street, S. E., Washington, D. C. At the party, appellant met and talked with another acquaintance named Taylor. Late in the morning, around 4:30 A. M., Taylor asked Mr. Brinkley to drive him and his girlfriend home inasmuch as he had had too much to drink (T. tr., afternoon session 15). Appellant drove Taylor and the girl to Taylor's home whereupon Taylor and the girl got out of the car. Taylor told appellant he would be around the next morning to get the car. When appellant got home, one of his sisters let him in the house and informed him that his boss had telephoned and requested that he go to work that morning. Appellant decided to drive Taylor's car to work that morning; en route he was stopped and arrested for the traffic offense described above. When he arrived at the precinct, he telephoned his employer. A short time later, his employer appeared and put up the Fifty Dollars collateral payment for appellant. Prior to his release, appellant furnished his name and address to the police. He was instructed to get someone with a driver's license to pick up the car. Appellant left the precinct and caught a bus home. He then went to Taylor's house and informed him that the car was at the police station. At that point, Taylor informed him to "leave it where it is, because the car was stolen" (tr. m. 53).

Mr. Brinkley further testified (tr. m. 53) that he was at all times between February, 1963 and December, 1969 employed in the metropolitan area and a resident of the District of Columbia. He testified in detail with respect to the various jobs he held and his addresses during this time (tr. m. 54-58). Other testimony was elicited corroborating the fact of appellant's unbroken residence within the District of Columbia from February, 1963 to February, 1969: appellant was married within the District of Columbia, in March 1963; he testified that he appeared in person to file for his marriage license within the District of Columbia; he was married by a local judge within the District of Columbia; he was arrested during the April, 1963 riots for a violation of the District of Columbia curfew and was incarcerated overnight. Appellant testified that he had other contacts with the local police: one of appellant's sisters became involved with the juvenile authorities; appellant testified (tr. m. 61) that he went to the police precinct, he gave his name to the police and took his sister home.

In December, 1963, appellant was arrested for a misdemeanor in Prince George's County and was ultimately sentenced to serve a ninety day term in the Prince George's County Jail. Several days before he was scheduled to be released, the Prince George's authorities received a detainer from the District of Columbia and subsequently appellant was arrested on a warrant charging him with the offense for which he was indicted (R1). Appellant testified that February 22, 1969 (the date of his arrest) was his first notice of the charges against him; he stated that when notified of the charges against

him, he made numerous efforts to locate witnesses for his defense (tr. m. 63-71); he was unsuccessful in locating many of the persons who could appear as witnesses in his behalf. Appellant testified that had he been given reasonable notice of the charges against him, he would have at least sought the advice of a lawyer (tr. m. 64).

Appellant's mother testified (tr. m. 77-81, T. tr., afternoon 30-35) that appellant lived with her until April, 1963; after he was married he moved with his wife to southeast Washington, D. C.; that after he moved to southeast, he visited his mother two or three times a week on his way home from work (tr. m. 78, T. tr., afternoon 31); Mrs. Brinkley stated that to her knowledge, at no time during 1968 did any police officer come to her house looking for appellant. At the hearing on the Motion To Dismiss, (tr. m. 31-32), the Assistant United States Attorney stipulated to the testimony of two available defense witnesses: Mr. Jasper Brinkley, Jr., appellant's brother, and one of appellant's sisters (unnamed in the record). With respect to Jasper Brinkley's testimony, the Government stipulated that he would testify that he lived at home during 1968-1969; that he worked with appellant on a daily basis; that at no time was he approached by any law enforcement officer concerning appellant's whereabouts during 1968-1968. The sister's stipulated testimony was essentially the same as the above-mentioned testimony.

Finally, at the hearing on the Motion To Dismiss (tr.m. 72-75), the Assistant United States Attorney suggested that he would be willing to stipulate, in the event of trial, to the testimony of Mr. Taylor, a missing witness for the defense. The Government stated (tr. m. 73) that it would "make every attempt to secure him as a witness, in the event we were unsuccessful in getting him here as a witness on behalf of the Defendant, I would stipulate that if called as witness, Mr. Taylor would testify that on the night in question he gave the Defendant the car and that I would even go so far as to stipulate that Mr. Brinkley went back to see him and he told Mr. Brinkley the car was stolen." The Assistant United States Attorney stated that the basis for the stipulation would be "in the event I could not get Mr. Taylor for the defense," (tr. m. 74). Defense counsel rejected this offer (tr. m. 75). Finally, after a colloquy with the presiding judge, the prosecutor (tr. m. 75) stated he would "stipulate to the testimony of all the witnesses."

On this note, the hearing on the Motion To Dismiss was concluded and after several months, the Court issued its Order of October 1, 1969, denying without findings appellant's motion (R11). The case was thereafter tried without a jury and appellant was acquitted of interstate transportation of a stolen motor vehicle and convicted of unauthorized use of a motor vehicle.

SUMMARY OF ARGUMENT

The one year delay between the time of the alleged offense and the date of arrest therefor constituted an unconstitutional deprivation of appellant's right to due process of law as guaranteed by the Fifth Amendment of the United States Constitution. Prejudice can be presumed in light of the unnecessary delay in this case; assuming arguendo, that in this case the presumed prejudice rule is inapplicable, appellant has demonstrated by overwhelming, un rebutted testimony, the irreparable prejudice to his ability to defend wrought by virtue of the unnecessary delay between the date of the alleged offense, February 25, 1963 and the date of the arrest, February 22, 1969.

ARGUMENT

The record below sets forth clearly that, at best, from the time of the alleged offense, on February 25, 1963 until appellant's arrest on February 22, 1969, efforts by the police to arrest appellant consisted of an inquiry with his mother and several inquiries with neighbors, all of which efforts terminated in April or May, 1968. Other than these statements made by Officer Sheehan, the trial record is barren of any attempts to notify appellant of the charges against him. The unchallenged testimony of appellant, corroborated by the testimony of his mother and the stipulated testimony of his brother and sister was that appellant lived and was employed within the District of Columbia at all times from February, 1963 until December, 1963 at which time he was incarcerated in Prince George's County on a

misdemeanor charge. The record is completely bare of any police attempt to locate appellant during a period of approximately eight months after Officer Sheehan bowed out of the case.

In Jackson v. United States, 122 U. S. App. D. C. 124, 351 F 2d 321, the defendant was convicted of illegally selling narcotics. On appeal, the delay between alleged offense and arrest was the critical issue. The defendant was charged with having sold narcotics some five months before his arrest. At the trial, the prosecution tendered only one witness to the alleged sale, an undercover agent. At the trial, the defendant made no attempt to show that he was prejudiced by the delay between the date of the alleged offense and the date of his arrest. With respect to the issue of delay-occasioned prejudice, the Court stated:

"In some cases the length of that delay may be so great that prejudice can be presumed unless the Government can show otherwise. See Hanrahan v. United States, 121 U. S. App. D. C. 134, 343 F 2d 363 (1965). But we cannot presume prejudice after a delay of five months. Some showing is necessary.

This is not to say that prejudice must be proved beyond a reasonable doubt or even by a preponderance of the evidence. In Ross we held it sufficient that the accused was able to establish only 'a plausible claim of inability to recall or reconstruct the events of the day of the offense,' Ross v. United States, (supra), Note 1, 349 F 2d at 215. The issue of prejudice being what it is, it will only be the rare case in which the accused can

show much more than this. As we noted in Ross, 'in a very real sense the extent to which he was prejudiced by the Government's delay is evidenced with particularity the elements of that prejudice.' Since the delay was the clear responsibility of the Government and was arranged solely for its advantage, the accused should not be forced to labor under an exacting burden of proof, but he must still show a plausible claim."

Further, in Jackson, the Court pointed out that it is not indispensable to establish this prejudice through defendant's testimony alone. "In other cases, it might be shown that witnesses whose testimony might have been produced have become unavailable." (Emphasis Added)

In Ross v. United States, 121 U. S. App. D. C. 233, 349 F 2d 210, the issue of delay between the date of the alleged offense and arrest was raised. Appellant was convicted of a narcotics violation solely upon the testimony of an undercover police officer. No corroboration was forthcoming other than the drugs asserted to have been purchased from appellant by the policeman on a stated date. The Complaint was not sworn until seven months after the alleged offense. Appellant was convicted and on appeal the case was remanded for supplemental findings with respect to the "reasonableness of the delay in apprising the appellant of the charges against him, and the effect of that delay on appellant's ability to defend against the charge." A hearing was held after which the lower court ruled that the delay was not unreasonable because it was "necessitated by the requirements of effective law enforcement." The

Court also concluded that even if the delay was unreasonable, there was no showing of prejudice to appellant by reason thereof.

Appellant was continuously available for arrest; at trial, the arresting undercover policeman testified largely from refreshed recollection just prior to the trial by reference to his contemporaneous entries in a notebook; he had no personal recollection of the incident. Appellant, on the other hand, had no notebook and was unable to account for himself in respect of the time and place in question because of an asserted lack of recollection and of means of reconstruction of the day involved. Appellant did, however, deny the offense. He argued that a deliberate and purposeful delay between the date of the alleged offense and the Complaint violated rights guaranteed by the Fifth Amendment of the United States Constitution. On appeal, the Court held that "....we think there was undue subordination of appellant's interests which should not, at least in a record as barren of reassuring corroboration as this one result in a sustainable conviction."

Addressing itself to the value judgments involved in equitable procedures for citizens faced with loss of liberty by reason of criminal charges, the Court stated:

"When interests of this nature impinge upon each other, as they have a way of doing, they must be accommodated. A balance must be struck if one or the other is not to be sacrificed completely."

Finally the Court held that:

"Without attempting to define the precise reach of the Fifth Amendment in this context, a due regard to our supervisory responsibility for criminal proceedings in this jurisdiction requires, in our view, the reversal of this conviction."

Again in United States v. Godfrey, 123 U. S. App. D. C. 219, 353 F 2d 850, the question of offense-arrest due process delay was at issue. Defendant was charged in a nine count indictment for narcotics violations; there were three sales involved, on October 10, 11 and 12, 1962. The purchaser was an undercover police officer who terminated his assignment as such on December 5, 1962. A Complaint was filed against the defendant on that day and a warrant issued for his arrest. It was not executed, however, until February 11, 1963, some four months after the alleged offense. The Government's case consisted of the testimony of the undercover officer and the introduction of the narcotics. Defendant denied making the sales. He testified that on October 10, 1962, he was in New York and that he could not remember what he was doing on October 11 and 12. The lower court ruled that the delay between the offense and Complaint was reasonable in light of its purpose to protect the undercover operations; and that had the arrest been made promptly after the Complaint, there would have been no problem of

prejudicial delay. The Court found however that under these circumstances the police activity was not diligent enough and the result was that the combined delays between the date of the offense to complaint and from the complaint to the arrest prejudiced defendant's ability to defend himself as to the second two sales. The charges with respect to the October 11 and 12 sales were dismissed and a new trial was granted on the counts relating to the October 10 sale because of the danger that appellant's inability on the witness stand to account for the alleged first sale may have prejudiced the jury's verdict on the October 10 count.

In affirming the lower court's ruling, this Court of Appeals stated:

"....where delay to serve the purposes of the public occurs, with inevitable impact upon the interests of accused, there is an obligation of the police to be as diligent as possible in making the arrest, to the end that the accused may know as soon as possible of the charges against him.... The disadvantage to the accused inherent in the deliberate preference accorded the public interest in the one period should not be compounded by a failure to exercise appropriate diligence in the other period."
(Emphasis added)

All of the above discussed cases are narcotics control situations. In each there is an underlying rationale for post-offense pre-arrest delay. The courts have held that public policy dictates that subject to safeguards, some post-offense pre-arrest delay must be tolerated in the area of narcotics traffic control. Balancing of conflicting interests of the defense on the one hand and

society on the other has been recognized as a delicate process. In the instant case, however, the critical factor on the one side of the scales is missing; there was no viable underlying public policy rationale to counter-balance the delay in advising appellant of the charges against him. Prompt notification would have jeopardized no legitimate governmental interest. The narcotic-delay cases demonstrate that the courts have struggled with the problem of balancing governmental and individual interests where post-offense pre-arrest delay was for a valid reason.

In the instant case, viewing the evidence in a light most favorable to the United States, on the date of appellant's arrest, the police were furnished with his correct name and address. Within twenty-four hours the police knew that the car in which he was arrested had been reported stolen. Between March 7, 1968 and April or May, 1968, the efforts made by the police consisted in asking appellant's mother to have appellant contact the police (without advising her why the police wished to see her son); they inquired with neighbors with respect to appellant's whereabouts. Approximately two months after the alleged offense nothing was done by the police to arrest appellant until February 22, 1969.

Jones v. United States, 133 U. S. App. D. C. 88, 402 F. 2d 639, presents a set of circumstances more closely analogous with the instant case. This Court of Appeals stated in Jones that a strong showing of a Fifth Amendment Ross violation had been made and remanded the case for a full pre-trial hearing on the issue of prejudice,

as a result of unnecessary delay between offense and arrest. The Court stated that:

"Defendant's rights under Ross are violated when there is an unreasonable lack of diligence on the part of the police in making an arrest which renders defendant unable to remember and account for his whereabouts at the time of the crime. Where the delay is for a valid purpose, such as protecting the identity of an informer, that factor can be weighed against the prejudice to the defendant."

In Jones (supra), a robbery case, there was testimony to the effect that in February, 1966, one month after the crime, the complaining witness tentatively identified the appellant from some photographs. Thereupon the police attempted to locate appellant. However, possibly through lack of communication, the total police effort over a seven month period apparently amounted to no more than a few checks at his residence and at former places of employment, plus leaving a message with his mother that the police were looking for him and leaving a telephone number for him to contact the police. During the seven month period, appellant lived with his mother in the District of Columbia and, as the police were aware, through most of this period worked as a barber a few blocks from his home. Appellant was ultimately arrested on an unrelated charge for which he was subsequently tried and acquitted. Appellant testified that because of the delay in learning of the robbery charge against him, he was unable to reconstruct his activities on the day of the robbery.

On remand, the Court ordered that "....there be a full pre-trial hearing in which the Government is given an opportunity to justify the seven month delay in appellant arrest and in which appellant is given the opportunity to show the extent to which the delay prejudiced him." On remand, the Jones case was disposed of on another issue.

The similarity between the Jones case and the case at bar is striking. Both are non-narcotics situations; both involve substantial delays between alleged offense and arrest and both involve defendant who lived and worked within the District of Columbia during the critical delay period. In Jones the Court did not appear impressed with the total police effort, over the seven month period, to locate appellant. It is submitted that the total police effort in the Jones case over a seven month period, substantially exceeded the diligence of the police in the instant case over the period of one year. Again, it should be emphasized in this case that by the Government's own testimony, there was absolutely no attempt to arrest appellant from May, 1963 through February, 1969, a period of eight months.

It is appellant's position that in light of Jackson v. United States, 122 U. S. App. D. C. 124, 351 F 2d 821 prejudice can be presumed in this case because the delay between the date of the alleged offense and the date of arrest is so unreasonably long. However, in the event this Court is not disposed to apply the presumed prejudice rule, the testimony in the Court below clearly

demonstrates that appellant has far exceeded his obligation to show a plausible claim of prejudice by virtue of the delay. Immediately upon being informed of the charges against him, appellant made efforts to secure witnesses who could assist him, in his defense. He testified that he would have secured the services of an attorney to guide him immediately subsequent to being charged; he testified that he attempted to find Taylor at his place of employment on several occasions; appellant testified that had he been notified earlier of the charges, he could have, in all likelihood, gotten in touch with Taylor's girlfriend and secured her as a witness on his behalf. However, as a result of the undue and unnecessary delay between alleged offense and arrest, appellant was unable to produce many crucial witnesses on his behalf.

At trial, therefore, appellant found himself in the undesirable position of first accurately reconstructing to the satisfaction of the trier of facts, events as they occurred on critical dates, events which transpired over a year ago; secondly, appellant was forced to go to trial without the critical witnesses to support his defense. He was forced to enter a credibility contest, pitting his version of events against that of the Government's, by taking the witness stand, gambling that he would be believed or waiving his right to testify and assuming any consequences which might flow from that election. In any event, it seems overwhelmingly evident that appellant's ability to defend himself was irreparably prejudiced by the delay.

The suggestion of the United States in the lower court that any prejudice to appellant's case was cured by the Government's offer to "stipulate to the testimony of all of appellant's missing witnesses" merits only brief comment. Applying the Government's rationale, it's logical application on a case-by-case basis would seem to resolve all constitutional attacks on post-offense pre-arrest constitutional claims. Serious issues of due process of law merit more penetrating analysis by responsive government.

The thrust of the Ross doctrine and its progeny is fundamental fairness. When a Ross delay occurs, it does not necessarily follow that because of a delay between offense and arrest the accused should reap a windfall. Clearly situations arise in the administration of justice when the rights of the accused must to a degree be compromised to the public weal. In any given case, many factors must be weighed. A delicate balance between the rights of society and the rights of the individual must be struck. Nonetheless, in all cases the touchstone is fairness, due process of law. It is appellant's position that in light of all the facts and circumstances, his right to due process of law has been denied him. The delay between offense and arrest resulted in irreparable prejudice to his ability to defend which was not and cannot be mitigated or explained away by any viable, demonstrable public interest. There are no substantial factors in this record which justify compromising the appellant's right to be advised of the charges which might deprive him of his liberty.

CONCLUSION

WHEREFORE, the foregoing considered, it is respectfully submitted that the appellant's conviction be vacated and this Honorable Court reverse appellant's conviction or that this Court grant such other relief as may be consistent with the advancement of the sound administration of justice.

Respectfully submitted,

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Following of Taylor
BRIEF FOR APPELLEE

**United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 24,012

UNITED STATES OF AMERICA, APPELLEE

ROMIE D. BRINKLEY, APPELLANT

**Appeal from the United States District Court
for the District of Columbia**

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Ct. No. 477-69

United States Court of Appeals

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22 D.C. Code § 108	3
22 D.C. Code § 2204	1

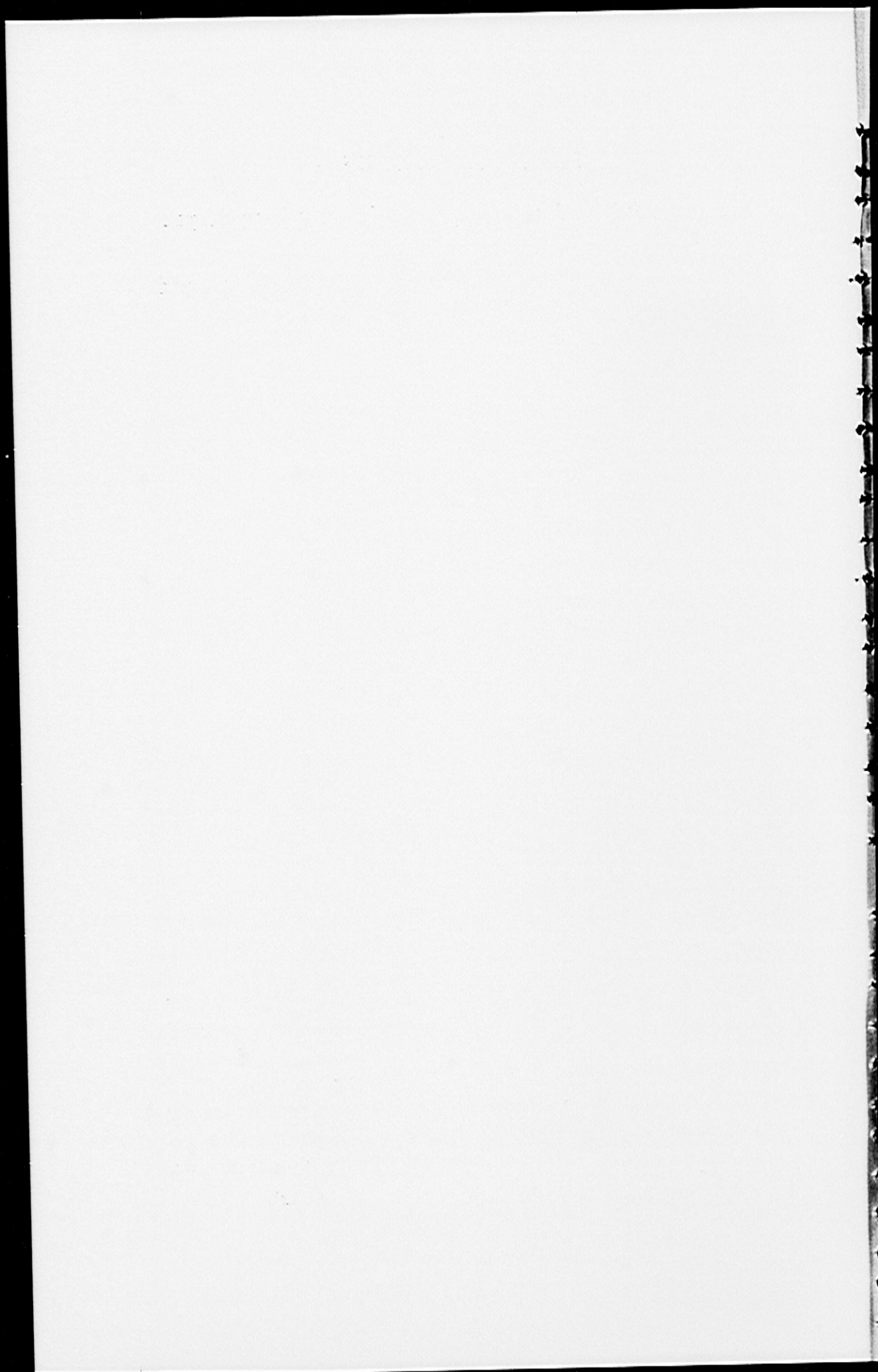
* Cases chiefly relied upon are marked by asterisks.

ISSUE PRESENTED *

In the opinion of appellee, the following issue is presented:

Whether the one-year lapse of time between offense and arrest denied appellant due process of law?

* This case has not previously been before this Court.



United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,012

UNITED STATES OF AMERICA, APPELLEE

v.

ROMIE D. BRINKLEY, APPELLANT

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By a two-count indictment filed April 2, 1969, appellant was charged with the interstate transportation of a stolen motor vehicle and unauthorized use of a motor vehicle in violation of 18 U.S.C. § 2312 and 22 D.C. Code § 2204, respectively. On July 29, 1969, a hearing on appellant's motion to dismiss the indictment was held before the Honorable William B. Bryant. At the conclusion of this hearing Judge Bryant took the matter under advisement, and on October 2, 1969, he issued an order denying appellant's motion. On October 29, 1969, appellant was

tried by the Honorable Edward M. Curran sitting without a jury. Chief Judge Curran found appellant guilty of unauthorized use of a motor vehicle and not guilty of the interstate transportation of a stolen motor vehicle. On February 12, 1970, appellant was sentenced to one to three years' imprisonment. This appeal followed.

The Hearing On The Motion To Dismiss

Appellant based his motion to dismiss the indictment solely on the contention that he was denied due process of law because of the alleged delay between the date of the offense and his arrest.

At the hearing on appellant's motion, Officer Terrance M. Sheehan of the Metropolitan Police testified that on February 25, 1968, at approximately 6:40 a.m., he was on routine patrol in his scout car. While the officer was traveling north in the 5100 block of Fifth Street, N.W., he observed appellant operating a 1954 Chevrolet with Tennessee license plates "in a very slow fashion, weaving in and out of lanes" (Tr. I, 5).¹ Sheehan halted the car for a routine traffic stop, and when appellant could not produce either his driving permit or the automobile's registration, Sheehan arrested him for operating a motor vehicle without a permit. At this time appellant told the officer that the car belonged to a nameless friend whom he had just met and that if he had a faster car the officer would never have caught him. Before transporting appellant to Precinct No. 6, Sheehan requested a "stolen check" on the automobile. That check revealed that the car was not listed as stolen even though the officer noticed that there was no key in the ignition and that it had been "hot-wired" (Tr. I, 5-6).

At the precinct appellant refused to give Sheehan any information about himself other than his last name.²

¹ "Tr. I" refers to the transcript of the hearing on the motion to dismiss the indictment held on July 29, 1969.

"Tr. II" and "Tr. III" refer to the transcript of the trial held on October 29, 1969.

² Appellant was not carrying any identification (Tr. I, 17).

Finally, after checking appellant's last name with criminal records, the officer came up with a date of birth and an address which appellant admitted were his (Tr. I, 6-8).

When Sheehan reported to his precinct shortly before midnight for roll call before starting work on February 26, 1968, he checked the teletype sheet and noticed that the car appellant had been operating earlier that day was now listed as stolen. In the meantime, appellant had posted \$50 collateral for the traffic charge and was no longer in police custody.

On Monday, February 26, 1968, upon Sheehan's application, a Court of General Sessions arrest warrant was issued for appellant on the charge of unauthorized use of a motor vehicle. When the officer returned to his precinct that same day, his otherwise unidentified superior officers told him that the correct charge was bringing stolen property into the District of Columbia (22 D.C. Code § 108). On March 7, 1968, again upon Sheehan's application, another Court of General Sessions arrest warrant was issued for appellant on this latter charge, and the first warrant was withdrawn (Tr. I, 9-11).

Between March and May 1968 Officer Sheehan made numerous³ unsuccessful⁴ attempts to serve the arrest warrant at appellant's address (2013 Third Street, N.W.)⁵

³ Sheehan was not certain as to the exact number of times he attempted service of the warrant (Tr. II, 5). At the pre-trial hearing he testified eight to ten times (Tr. I, 11, 21) and eight to fifteen times (Tr. I, 21). At trial he testified that "[t]he exact number of times I went to his residence where the defendant lived I don't know. I suppose four or five" (Tr. II, 5).

⁴ Each time the officer attempted service at appellant's house, the door was not answered (Tr. I, 11). Sheehan also talked to people living in the neighborhood of 2013 Third Street, N.W. Some of these people said appellant was in Baltimore; others said he was in Southeast Washington. Some also claimed they did not know appellant (Tr. I, 13).

⁵ The officer was also uncertain as to the exact dates in March and April 1968 that he attempted to serve the warrant (Tr. I, 24).

(Tr. I, 12-13). When Sheehan finally talked with appellant's mother, it was by coincidence. Sometime in the latter part of April 1968, while Sheehan was at Precinct No. 6, he discovered that appellant's younger brother was in police custody. He noticed that the young man's parents were also present at the precinct, advised them of the outstanding warrant and inquired as to appellant's whereabouts. Appellant's mother then told Sheehan that she had not seen appellant for a long time (Tr. I, 13-14). Sheehan made no further attempts to serve the arrest warrant. Appellant was arrested for this offense in the latter part of February 1969. The arrest was made on the basis of a detainer lodged at the Prince Georges County Jail pursuant to a United States Commissioner's arrest warrant issued for appellant on February 12, 1969, charging him with the interstate transportation of a stolen motor vehicle (Tr. I, 36).

Appellant testified in his own behalf, distinctly relating all of the details surrounding his possession of the stolen automobile. On February 24, 1968, at approximately 8:00 p.m. he went to his girl friend's house, where he stayed until 9:30 p.m. He then went to a beer garden at Fourth Street and Florida Avenue, N.E., where he met an otherwise unidentified friend (Tr. I, 46-47). After having a "couple of beers," both men went by taxi to a party somewhere on Forty-eighth Street, S.E. (Tr. I, 47). Appellant drank beer and conversed with one Robert Taylor at the party, and at approximately 4:30 a.m. Taylor asked appellant to drive him home in his (Taylor's) car. Appellant agreed and drove both Taylor and Taylor's girl friend to Taylor's house, located at Fourth and T Streets, N.E. Taylor and his girl friend alighted from the car, and Taylor told appellant that he would pick the car up the next day (Tr. I, 48).

Appellant then drove home. When he arrived home, his sister told him that his boss, Mr. George Christy, had called requesting appellant to come to work that day. Appellant rested for thirty minutes and decided to drive

to work in the car with which Mr. Taylor had entrusted him (Tr. I, 48).

Appellant then testified about his arrest by Officer Sheehan. While he admitted that he did not have a driver's permit or a registration for the car, he denied telling the officer that he would have outrun him had he had a faster car (Tr. I, 49). He testified that Taylor gave him a key to operate the car, that there was a key in the ignition at the time of his arrest on the traffic charge and that the car was not "hot-wired" (Tr. I, 70). Appellant also claimed that the police took his identification from him when he was arrested (Tr. I, 51).

When Mr. Christy posted \$50 collateral for appellant on the traffic charge, he was released from custody. Mr. Christy then drove him to a bus stop and appellant rode home by bus. After staying at home for an otherwise unspecified amount of time, appellant went to Taylor's house and told him that the police had custody of the car. Taylor told appellant "to leave it where it was because the car was stolen" (Tr. I, 53). Appellant testified that this was the first time he realized the car was stolen.

Appellant then testified that he lived with his parents and family at 2013 Third Street, N.W., from February 1968 until sometime in April 1968. He was married in the District of Columbia in March 1968, and in April he moved with his wife to 1624 Twenty-seventh Street, S.E. He lived at that address until he was arrested in Prince Georges County on December 9, 1969. He further testified that he was employed by Mr. Christy, who was a brick contractor, from February 1968 until July 1968 and that he met Mr. Christy at Georgia and Alaska Avenues, N.W., each morning that he worked. He then worked at Andrews Air Force Base until September 1968. From September 1968 until the time of his arrest in Prince Georges County, he worked for Pitts Masonry.* Appellant also testified that he was arrested for a curfew violation during the April 1968 civil disturbances,

* The record does not indicate where Pitts Masonry is located.

kept in police custody overnight and then released (Tr. I, 53-62).

Finally, appellant stated that when he was advised of the more serious charges against him, he made five or six unsuccessful attempts to locate Mr. Taylor for use as a witness. He also made efforts to locate the unidentified young man that he was with at the beer garden on February 24, 1968, as well as the young lady he drove home with Taylor. These efforts also proved futile (Tr. I, 63-64).

Appellant's mother, Mrs. Annette Brinkley, testified that appellant lived with the Brinkley family at 2013 Third Street, N.W., from February 1968 until he was married in March 1968. She stated that even after appellant moved to Southeast Washington with his wife, he visited her two or three times weekly. Mrs. Brinkley further testified that she did not remember any policeman coming to her house inquiring about appellant. She did, however, recall an incident in April 1968 involving appellant. At that time two of her other children became lost. The police had them in custody and called Mrs. Brinkley requesting that she pick them up. Mrs. Brinkley and her husband responded to the precinct, and when she identified herself, an officer inquired if she was appellant's mother. When she answered in the affirmative, this officer told her to tell appellant to surrender himself. When she returned home and told appellant of this, he told her that the matter concerned child support (Tr. I, 77-81).

In the interest of saving time, the prosecutor stipulated to the testimony of Jasper Brinkley and appellant's sister.⁷ The stipulation was that Jasper and appellant's sister would testify that they both lived at home during the time appellant lived there, that Jasper and appellant worked for Mr. Christy on a regular basis, and that at no time did the police come to their house looking for appellant (Tr. I, 81-82). In an effort to reduce any possible prejudice to appellant because of his alleged inability

⁷ Appellant's sister's name does not appear in the record.

to locate Mr. Taylor, the prosecutor proffered a stipulation in regard to Taylor. The prosecutor said that in the event Mr. Taylor could not be located for trial,

I would stipulate that if called as a witness, Mr. Taylor would testify that on the night in question, he gave the [d]efendant the car and that I would even go so far as to stipulate the [sic] he would testify that Mr. Brinkley went back to see him and he told Mr. Brinkley the car was stolen (Tr. I, 73).

Appellant's counsel quickly rebuffed this offer⁸ (Tr. I, 75).

At the conclusion of the hearing, the prosecutor requested that the court "give some thought" about the proposed stipulation as to Mr. Taylor's testimony. The court thereupon took the motion under advisement (Tr. I, 83).

The Trial

The complainant, Howard L. Pruitt, testified that on February 24 and 25, 1968, he owned a 1954 Chevrolet which was registered in Tennessee. The serial number of the car was 306995, and the manufacturer's identification number was D-54B-9155.⁹ On February 24, 1968, Mr. Pruitt was living at 2742 Kentland in Orlando, Maryland. At 8:30 p.m. on that date he parked the car outside his sister's house, removed the key from the ignition, and went inside the house. When Pruitt awoke between 6:30 and 7:00 a.m. on the morning of February 25, he noticed that his car was missing. He immediately called the Seat Pleasant Police Department, and when they responded, he gave them the identification numbers of the car. The

⁸ At trial, however, appellant's counsel requested this stipulation and it was agreed to by the prosecutor (Tr. III, 38-41).

⁹ Mr. Pruitt apparently misread this manufacturer's identification number from the automobile's registration (Government's exhibit No. 1) during his testimony. Government's exhibit No. 1, which is not part of the record but which is filed with the Clerk of the District Court, lists the number as B54B-104995.

next time Pruitt saw the car was at Precinct No. 6 in Washington on February 26, 1968. Pruitt never gave anyone permission to drive, operate or use his automobile on either February 24 or 25, 1968 (Tr. II, 3-7).

Officer Sheehan then testified as to appellant's arrest on February 25, 1968, for driving without a permit. The officer identified the vehicle appellant was driving as having serial no. 54B-104995.¹⁰ He also reiterated the efforts made to execute the arrest warrant for appellant after learning that the car was stolen (Tr. II, 7-23; Tr. III, 3-10).

The Government then rested. Appellant's renewed motion to dismiss the indictment, as well as his motion for judgment of acquittal, was denied (Tr. III, 12).

Appellant was the first witness called by the defense, and his testimony was a reiteration of that given at the hearing on the motion to dismiss the indictment (Tr. III, 13-30). Appellant's mother likewise repeated her earlier testimony (Tr. III, 30-33, 35-36).

The prosecutor recalled Officer Sheehan for the purpose of rebuttal. Sheehan testified that at the time of appellant's arrest on February 25, 1968, appellant told him that the 1954 Chevrolet belonged to a friend the name of whom he did not know¹¹ (Tr. III, 36-37).

It was again stipulated that if other members of appellant's family testified, they would say that appellant resided and worked in the Washington area between February and December 1968 (Tr. III, 33-34, 36). Finally, at appellant's request, it was stipulated that if Mr. Taylor testified,¹² he would say that he entrusted appellant with the stolen automobile on February 25, 1968, not

¹⁰ Although both the prosecutor and Officer Sheehan referred to this number as the serial number, it was really the manufacture's identification number. See note 9, *supra*.

¹¹ Appellant had previously testified that he told the police that it was Taylor's automobile (Tr. III, 29-30).

¹² Taylor obviously would have had to waive his right against self-incrimination.

telling him it was stolen until after appellant was arrested for the traffic offense (Tr. III, 38-41).

ARGUMENT

The one-year lapse of time between offense and arrest did not deny appellant due process.

(Tr. I, 11-13, 46-54; Tr. II, 5)

Appellant asserts that he was denied due process because he was not arrested for the instant offense until a year after its commission. Specifically, appellant contends that he "has demonstrated by overwhelming, un rebutted testimony, the irreparable prejudice to his ability to defend wrought by virtue of the unnecessary delay between the date of the alleged offense, February 25, 1968 and the date of the arrest, February 22, 1969" (Brief for appellant at 8). We disagree. To make a successful due process argument on the basis of delay between offense and arrest, it is necessary that *appellant* show that "there was no legitimate reason for the delay, and that he was prejudiced by the delay." *Powell v. United States*, 122 U.S. App. D.C. 229, 232, 352 F.2d 705, 708 (1965); see *Jones v. United States*, 131 U.S. App. D.C. 88, 402 F.2d 639 (1968); *Jackson v. United States*, 122 U.S. App. D.C. 124, 351 F.2d 821 (1965); *Ross v. United States*, 121 U.S. App. D.C. 233, 349 F.2d 210 (1965). We submit that appellant has satisfied neither of these requirements.

Although Officer Sheehan was uncertain as to the exact number of times he attempted to arrest appellant on the basis of the warrant (Tr. II, 5), it is evident from his testimony that unsuccessful efforts at service of the warrant were made in March, April and May 1968. This was true even though Sheehan was assigned to Precinct No. 6 and the warrant was forwarded to Precinct No. 13 (Tr. I, 11-13). We submit that after the numerous unsuccessful attempts at service of the warrant were made, it was not unreasonable for Sheehan to curtail his ef-

forts at service. We therefore maintain that there was not "an unreasonable lack of diligence on the part of the police in making [the] arrest," *Jones v. United States, supra*, 131 U.S. App. D.C. at 90, 402 F.2d at 641, and that there was accordingly a legitimate reason for the delay.

Assuming *arguendo* that there was an unreasonable delay in appellant's arrest, he suffered no prejudice by the delay. In *Woody v. United States*, 125 U.S. App. D.C. 192, 370 F.2d 214 (1966), and *Ross v. United States, supra*, this Court reversed narcotics convictions on the basis of prejudice to the defendants because of an unreasonable delay in arrest. The prejudice suffered in each of those cases, as well as in *Jones v. United States*,¹³ *supra*, was the defendant's *total inability* to recall any of the events concerning the day of the offense. Indeed, when a defendant cannot account for his whereabouts at the time of the crime, "[t]he reliability of the verdict [when the undercover narcotics officer is the Government's only witness] then depends solely upon the quality of the police identification." *Woody v. United States, supra*, 125 U.S. App. D.C. at 194, 370 F.2d at 217.

In the case at bar, the record clearly indicates that appellant was able to recall his activities on February 24 and 25, 1968, in precise detail. He testified that he went to his girl friend's house at 8:00 p.m. on February 24, staying until 9:30 p.m. He then went to a beer garden at Fourth Street and Florida Avenue, N.E., and drank two beers with a friend. He next went to a party with this friend on Forty-eighth Street, S.E., staying until 4:30 a.m., when he left with Robert Taylor and Taylor's girl friend. Appellant distinctly remembered driving to Taylor's house at Fourth and T Streets, N.E. (Tr. I, 48). He was also able to recall all the factors surrounding his arrest for driving without a permit as well as the

¹³ This Court remanded *Jones*, which was a robbery case, for the purpose of determining the reason for the delay by the Government and its relation to the prejudice suffered by the defendant.

fact that he took a bus home after Mr. Christy posted \$50 collateral on the traffic charge (Tr. I, 46-54). Appellant's virtually total reconstruction of the events of February 24 and 25, 1968 clearly indicates that he did not experience the prejudice suffered by the defendants in *Woody, Ross and Jones*.

The thrust of appellant's prejudice argument is that "as a result of the undue and unnecessary delay between alleged offense and arrest, [he] was unable to produce many crucial witnesses on his behalf" (Brief for appellant at 17). We of course recognize that prejudice may be established if witnesses that would have been available to testify for a defendant had he been promptly arrested become unavailable because of delay by the Government. See *Woody v. United States, supra*. However, we fail to see how appellant can rely on this proposition. We cannot believe that Mr. Taylor, if he actually exists and could have been found by appellant, would come to court and testify that he entrusted appellant with a stolen automobile and, further, that he did not inform appellant of this until after appellant was arrested for the traffic offense. Certainly Taylor would have invoked his privilege against self-incrimination.¹⁴ Cf. *Hinton v. United States*, — U.S. App. D.C. —, 424 F.2d 876 (1969).

Assuming *arguendo* that Taylor could have been found had appellant been arrested more promptly and that he would have been willing to incriminate himself severely, the stipulation as to his testimony vitiated any prejudice to appellant. Although appellant dismisses the importance of this stipulation, it cannot be denied that by entering into the agreement, the prosecutor forfeited the Government's right to cross-examine an adverse witness. If in the interest of vitiating alleged prejudice to a defendant, we agree to accept without cross-examination the

¹⁴ We also cannot believe that Taylor's girl friend, if she exists and had been found by appellant, would have testified. Given her relationship to Taylor and the fact that she was riding in a stolen vehicle, thereby "using" the vehicle, we suggest she would have been extremely recalcitrant when called to testify.

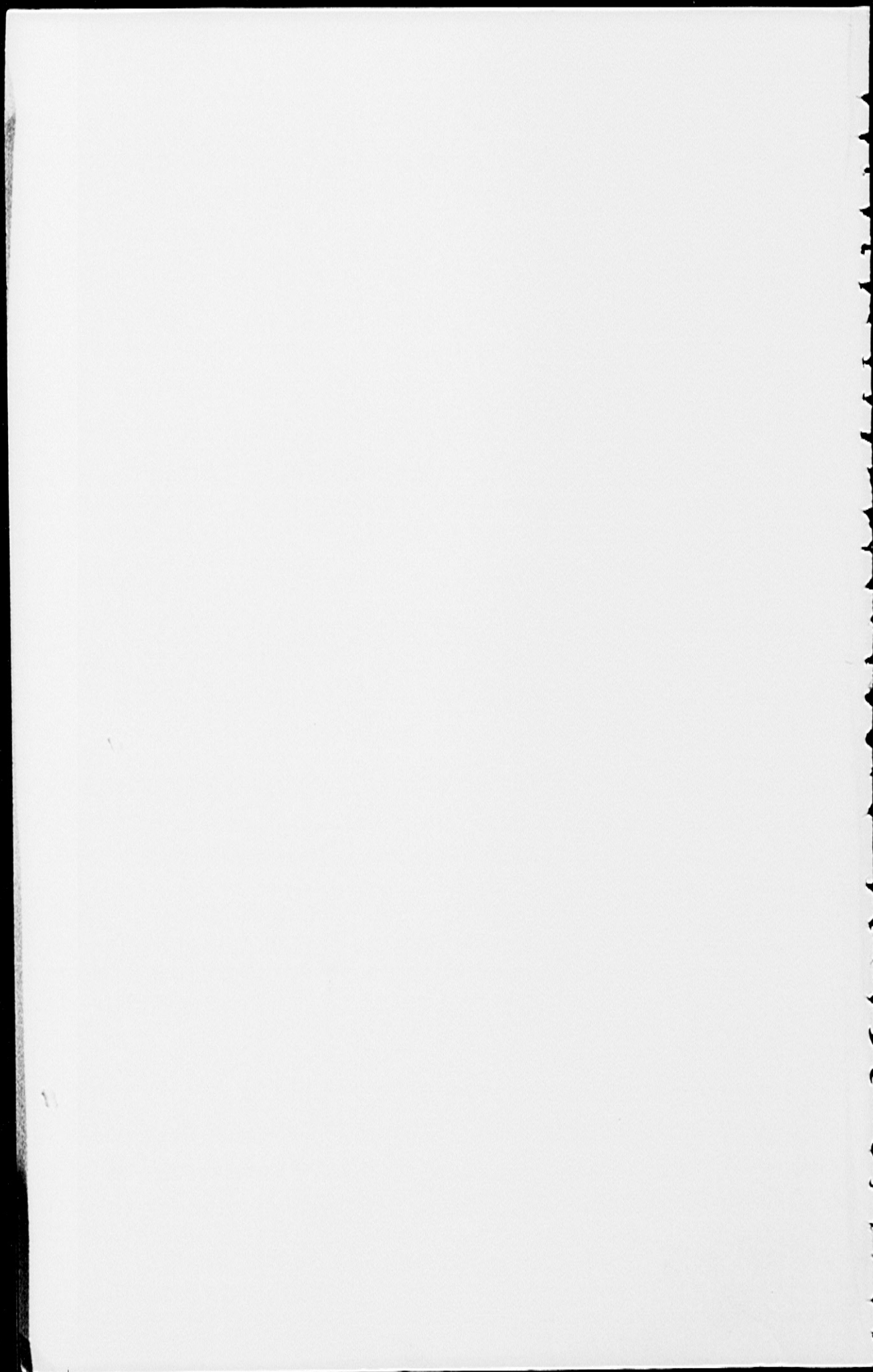
testimony of a witness who we are not even certain exists, we fail to recognize how the prejudice of which appellant speaks would not be thereby cured.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

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ROBERT S. BENNETT,
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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA

Appellee

v.

ROMIE DAVID BRINKLEY

Appellant

Criminal No. 477-69
No. 24012

REPLY BRIEF OF APPELLANT

United States Court of Appeals
for the District of Columbia Circuit

FILED DEC 3 1970

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Appointed By This Court

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA

Appellee

v.

ROMIE DAVID BRINKLEY

Appellant

Case No. 477-69
(Cr. 24012-70)

REPLY BRIEF OF APPELLANT

Romie David Brinkley, appellant herein, by his Court appointed attorney, in compliance with this Court's request, herewith respectfully submits his Reply Brief in the above-captioned appeal with regard to the issue of prejudice.

In its brief, appellee argues that, assuming there was an unreasonable delay in appellant's arrest, ... "he suffered no prejudice by the delay." Appellee goes on to cite Woody v. United States, 125 U.S.App. DC 192, 370 F.2d 214 (1966), Ross v. United States, 121 U.S.App. DC 233, 349 F.2d 210 (1965) and Jones v. United States, 131 U.S.App. DC 88, 402 F.2d 639 (1968) to shore up its no-prejudice argument. Appellee states that the prejudice suffered in each of those cases was... "the defendant's total inability to recall any of the events concerning the day of offense." Appellee cites various of appellant's alleged statements from memory regarding the events of February 24 and 25, 1968 and concludes that... "Appellant's virtually total reconstruction of the events of February 24 and 25, 1968 clearly indicates that he did not experience the prejudice suffered by the defendants in Woody, Ross and Jones."

Appellant does not wish to belabor appellee's characterization of the quality and quantity of appellant's recall of the events which the Government cites evidencing the "virtually total reconstruction" of the events of February 24 and 25, 1968. It should, however, in the interest of balanced presentation of the record below, be stated that the Government's recitation of the facts is not entirely complete.

Briefly, in citing appellant's recollection in "precise detail at (Tr 1,48) appellee states appellant "testified he went to his girl friend's house at 8pm..., staying until 9:30pm." In the transcript (Tr M.to D.,48) there is no statement by the defendant relative to the hour at which he arrived at his girl friend's house. However, at page 46 of the same transcript, defendant states that he..."stayed over there (at his girl friend's house) for, I guess, around about 9:30; or 10..." Appellant did not therefore leave "at 9:30pm." Mr. Brinkley testified that later he had "a couple of beers" with a friend whose name he could not remember; thereafter, he and his friend went to a party on 48th Street. Appellee states that Brinkley testified he stayed at the party..."until 4:30am..." when he left with Robert Taylor and his girl friend." However, the transcript (Tr 1,48) reveals that appellant's recitation was somewhat short of total recall. At (Tr M.toD.,48) appellant states:

"Well, we went into the party and was there for maybe an hour and a half and this guy named, Robert, named Taylor came in and we started talking for awhile, you know, had a couple of beers and I don't know exactly what time it was while we left, I guess it was around three, around 4:30, I guess, something like that when we left the party. So I told him, "Yes"; he had this girl with him; he got in the back of the car."

It is submitted that it is reasonable to conclude that appellant's memory of events when viewed in context constitutes something substantially less than "virtually total reconstruction."

Addressing itself to another element of prejudice, appellee recognized in its brief the principle that prejudice may be established if witnesses who would have been available to testify for a defendant had he been promptly arrested become unavailable because of delay by the Government. The Government, however, ... "cannot believe that Mr. Taylor, if he actually exists and could have been found by appellant^{/1/}, would have come to court and testified that he entrusted appellant with a stolen automobile and further, that he did not inform appellant of this until after appellant was arrested for the traffic offense. Certainly Taylor would have invoked his privilege against self incrimination." In a footnote cited in conjunction with the above quote, the Government goes on to state, "we also cannot believe that Taylor's girl friend, if she exists and had been found by appellant, would have testified. Given her relationship to Taylor and the fact that she was riding in a stolen vehicle, thereby "using" the vehicle, we suggest she would have been extremely recalcitrant when called to testify."

/1/ At (Tr M.to D.,73) the Government made its initial offer to "stipulate." The Government stated it would make every attempt to secure Mr. Taylor as a witness. The Government stated that the basis for the stipulation would be..."in the event I (the Government) could not get Mr. Taylor here for the Defense." "If I can't get the Defense witness here, I would stipulate to what I said I would stipulate to." At trial (Tr, afternoon session, 38) it became apparent that the Government had made no effort to find Mr. Taylor. Notwithstanding, the Government further stated that it was its position..."that Mr Taylor does not exist."

When, during the hearing on the Motion to Dismiss, the Government initially suggested the "stipulation" of Mr. Taylor's testimony, it was rejected (Tr M.toD.,74). One reason for this rejection was because there was no basis for a stipulation. No one had ever succeeded in contacting Mr. Taylor or any other of appellant's unavailable witnesses. No one could possibly know the nature or content of the testimony of any of the unavailable witnesses for the defense - not the Government - not the defense. The prosecution's proffer was therefore sleeveless, meaningless.

It should be made quite clear that Mr. Taylor was not the only individual sought out by appellant to aid in his defense. Appellant attempted to locate the individual with whom he had attended the party where appellant saw Taylor (Tr M.toD.,63). Appellant testified that had timely charges been lodged against him, he would have been able to locate the girl who accompanied Taylor in the automobile on the morning of the alleged offense (Tr M.toD., 79). He stated that although he did not know the girl, he could have contacted Taylor. Limiting the no-prejudice argument to a discussion of the impact of the absence of Mr. Taylor and the girl in the car is unrealistic. Nonetheless, appellee's reasoning in its argument relating to Taylor and the girl cannot be overlooked. Appellee says Taylor would not testify for appellant; he would..."certainly invoke his privilege against self incrimination." It is unclear to appellant how the Government can involve itself in this brand of myopic speculation. The inescapable conclusion, given the Government's assumptions, is that if Taylor exists, he must be the culprit; he must necessarily have committed this crime; thus under no circumstances

would he testify. Appellee goes on to state that ... "We also cannot believe that Taylor's girl friend would have testified." On the theory that, indeed, ... "her relationship with Taylor" and the fact that she was riding in a stolen car... "we suggest she would have been extremely recalcitrant when called upon to testify."

With this footnote, appellee has read into the record the theory that not only was the girl in all likelihood guilty of a federal offense but that she and Taylor shared some kind of "relationship" which would inhibit her desire to see that the truth prevailed. The record is barren of any testimony suggesting a "relationship" between Taylor and the girl. Appellant states, therefore, that the statements in appellee's brief referred to above simply lack substance. They do not meet the serious constitutional problem before this Court. The fact is that the delay of one year between the alleged offense and arrest therefor resulted in prejudice of substantial proportions to this appellant.

One fundamental element of prejudice to which I shall refer only briefly is that had this appellant been advised of the charges against him within a reasonable time after the alleged event, he would have been afforded his constitutional right to legal counsel during a period when the evidence was fresh - when leads could have been pursued by someone equipped to take up this task with expertise - someone charged with protecting this man's right to an even break. We are not in a position to speculate concerning what might have been turned up - we do not know with certainty who would have testified in aid of

appellant's defense or what they would have said. What is submitted is that there was a substantial delay which critically reduced appellant's opportunities to prepare his defense. This, we submit, is sufficient prejudice. No amount of second-guessing makes that statement any less important, neither appellee's statements with respect to "vitiating" prejudice nor its characterization of appellant's missing witnesses.

Appellee argues that assuming "Taylor could have been found had appellant been arrested promptly...the stipulation as to his testimony vitiated any prejudice." The Government states that by allowing the stipulation it forfeited its right of cross examination. It is submitted that this sort of statement would ultimately reduce all Due Process delay cases to a determination by the Government that where a post-offense, pre-arrest delay occurs and as a result a defendant is unable to locate and produce witnesses on his behalf, the Government can "vitalize" the prejudice by "stipulating" to what defendant submits his witnesses might say. By stipulating and foregoing its right to cross examination, the formula is complete - prejudice is erased.

We submit that an accused has the right to something more than the agreement of the United States to allow that if the defendant had been afforded an opportunity to adequately prepare his defense, he would have produced one or more witnesses who would have said one thing or another. Due Process demands more. Fundamental fairness dictates that the accused be afforded time,

with the assistance of counsel, to investigate - to produce live witnesses for trial. When an individual is charged with a serious offense, when his future lies in jeopardy, when he is faced with loss of liberty, equity demands he be timely advised of the charges lodged against him. From that point forward, it is up to the accused and his counsel to expend all necessary efforts to present the best possible defense. Here, because of the unreasonable delay between alleged offense and arrest, appellant was never in a position to take advantage of his right to prepare - a basic right of every accused under the United States Constitution.

WHEREFORE, the foregoing considered, it is respectfully submitted that the appellant's conviction be vacated and this Honorable Court reverse appellant's conviction or that this Court grant such other relief as may be consistent with the advancement of the sound administration of justice.

Respectfully submitted,

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